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"I Have to Pay a Volunteer What?" Liability to Volunteers under the Fair Labor Standards Act

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Volunteers are an integral part of operations for some organizations. Despite the altruistic intent, volunteers can pose a significant risk to an organization as an employer. The **Fair Labor Standards Act** of 1938, 29 U.S.C. § 201, *et seq.*, as amended, (the "Act") governs certain aspects of an employer's obligations related to its employees, including minimum wage, overtime pay, record keeping, and limitations on youth employment. Although the Act does not apply to every organization, it does apply to organizations engaged in commerce; federal, state, or local government agencies; hospitals or other institutions engaged in caring for the sick, aged, or mentally ill; schools; and organizations with annual sales in excess of \$500,000, regardless of for-profit or nonprofit status. *See, e.g.*, 29 U.S.C. § 206(a) & 203(b), (r). As a result, many organizations may be at risk of having to pay supposed volunteers wages, including overtime, if the organization fails keep the employee versus volunteer distinction intact.

To address volunteers, courts have interpreted the definition of "employee" in the Act such that an "employee" does *not* include an individual who "without promise or expectation of compensation, but solely for his personal purpose or pleasure, worked in activities carried on by other persons either for their pleasure or profit." **Tony & Susan Alamo Foundation v. Secretary of Labor**, 471 U.S. 290, 295 (1985). Regulations promulgated by the United States Department of Labor provide a specific definition of "volunteer," but only in the context of services performed for state and local government agencies. *See* 29 C.F.R. § 553.101. As defined, "volunteers" for state or local government agencies are those who perform services "for civic, charitable, or humanitarian reasons" on their own free will, without pressure or coercion from their employer and without the promise, expectation, or receipt of compensation for the services. *Id.* Further, state and local government agencies' employees may not perform the same type of services that those employees perform as part of their job on a volunteer basis. *Id.* § 553.101(d).

Unfortunately, whether an organization labels an individual as a "volunteer" rather than an "employee" makes little difference. Instead, courts apply a reasonableness standard and look at the "objective facts surrounding the services performed to determine whether the totality of the circumstances establish volunteer status, . . . or whether, instead, the facts and circumstances objectively viewed, are rationally indicative of employee status." *Okoro v. Pyramid 4 Aegis*, No. 11-C-267, 2012 U.S. Dist. LEXIS 56277, *23 (E.D. Wis. April 23, 2012). Courts will look at the economic reality of the situation, the relationship of parties, and the goals of the Act. *Id.* Some other factors courts may look at include, without limitation, whether:

- the individual has a personal civic, humanitarian, charitable, religious, or public service motive to perform the services;
- the services performed are different from those typically performed by paid workers;
- the individual has control over his or her schedule and works less than full time;
- the organization received an immediate advantage from any work done by the individual.



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In light of the ambiguous "totality of the circumstances" test applied by courts, concerns specific to a particular organization should be directed to an attorney. There are a number of steps, however, every organization can take to minimize its liability to volunteers under the Act.

1. Do not pay volunteers for their services. The only payment an organization should make to a volunteer is for reimbursement of actual expenses incurred by that volunteer for the organization.
2. Limit the amount of "perks" volunteers receive for volunteering.
3. Do not enter into contracts with volunteers for their services.
4. Do not promise future employment to volunteers.
5. Do not require volunteers to abide by the employee handbook, but instead consider creating a separate volunteer handbook. If a volunteer handbook is desired, consult with an attorney as to the appropriate language in the handbook to ensure it does not otherwise imply an employer-employee relationship.

Following these basic steps will at least start an organization on the right path of avoiding financial liability to volunteers under the Act.

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